

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

SIMON HAKKER,

Employer,

and

TEAMSTERS UNION, LOCAL 517,
CREAMERY EMPLOYEES AND DRIVERS,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS UNION,

Petitioner.

Case No. 94-RC-1-VI

20 ALRB No. 6
(May 10, 1994)

DECISION ON CHALLENGED BALLOTS AND
CERTIFICATION OF REPRESENTATIVE

On January 5, 1994, a petition for certification was filed with the Agricultural Labor Relations Board (Board) by the Teamster Union, Local 517, Creamery Employees And Drivers, International Brotherhood of Teamsters Union (Teamsters), seeking a unit of the agricultural employees of Simon Hakker (Employer or Hakker) . An election was held on January 14, 1994 with the following results:

Teamsters	6
No Union	1
Unresolved	
Challenged	
Ballots	<u>19</u>
Total	26

The challenges were made by a Board agent on the grounds that the prospective voters were not in the bargaining unit or were not working during the applicable payroll period, December 16 through December 31, 1993. Since the number of unresolved challenged ballots was outcome determinative, the

Regional Director (RD) conducted an investigation and issued the attached Challenged Ballot Report on March 14, 1994. In his report, the RD recommended that the challenges to 16 ballots be sustained, two be overruled and the ballots counted, and one be set for hearing should it be outcome determinative after a final decision as to the other challenges. The Employer filed timely exceptions to the Challenged Ballot Report, asserting that the RD erred in sustaining 16 of the challenges and finding that conflicting evidence required a hearing as to one of the challenges.¹

The Board has reviewed the RD's Challenged Ballot Report in light of the Employer's exceptions and supporting brief and declarations and affirms the RD's findings and recommendations to the extent consistent with this Decision.²

Most of the RD's recommendations, with which we find no fault, turn on a determination of whether the individuals at

¹Hakker does not dispute the RD's recommendation that two of the challenges, involving George Smith, Jr. and Cheryl Hakker, be overturned and the ballots counted.

²In affirming the RD's recommendations, especially with regard to the challenges to the votes of Duane Penner and Ron Grant, we note the well-established standard for the evaluation of exceptions to challenged ballot reports. The party filing exceptions to a challenged ballot report has the burden to provide sufficient evidence to create a material dispute and conclusory statements or assertions are not sufficient to do so. (See, e.g., Sequoia Orange Co. (1987) 13 ALRB No. 9; Mayfair Packing Co. (1983) 9 ALRB No. 66.) The Employer's mere assertion that these individuals worked for the employer during the eligibility period is insufficient to meet that burden in this case.

issue are "employees" or "independent contractors."³ While it has been a common understanding that independent contractors are not included within the definition of "agricultural employee" set out in Labor Code section 1140.4, subdivision (b), the drafters of the Act omitted the term "independent contractor" from the ALRA's exclusions from employee status. Such an omission appears to be related to the Act's exclusion of farm labor contractors from employer status.

Based on the categorizations of the ALRA, we need only address whether the challenged voters were agricultural employees of the Employer. The facts recited in the RD's Challenged Ballot Report are sufficient to show that none of these individuals were treated as, or understood themselves to be, employees of Hakker during the payroll period preceding the election. The lack of payroll entries by Hakker is particularly persuasive, since agricultural employers are required to maintain payroll records for directly hired agricultural employees as well as for any employees of farm labor contractors working on their land. Rather, these challenged voters all appear to have lacked a

³The Regional Director found that, under the National Labor Relations Act (NLRA or national act), the National Labor Relations Board (NLRB) would deem these 16 individuals "independent contractors" rather than employees of an employer, and thereby ineligible for inclusion as rank-and-file employees in a unit appropriate for collective bargaining. However, the sole and pivotal inquiry under the Agricultural Labor Relations Act (ALRA or Act) is whether the individual was an agricultural employee, as that term is defined in section 1140.4 (b) of the Act, of the Employer at any time during the payroll period immediately preceding the filing of the petition for certification.

sufficient connection with Hakker to have taken on the status of employees.

In the absence of their treatment as direct employees of Hakker or as employees of farm labor contractors, we find it sufficiently established that they were not eligible to vote by virtue of not having been employed during the payroll period preceding the election.

ORDER

In light of our concurrence with the Regional Director that 16 of the challenged ballots be sustained, neither of the two additional ballots that the Regional Director recommended be overturned need be opened and counted nor the remaining ballot held for further consideration or hearing.⁴ As the two resolved but uncounted challenged ballots and the remaining unresolved challenged ballot are not outcome determinative and there having been filed no objections to the election, the Teamsters Union, Local 517, Creamery Employees and Drivers, International Brotherhood of Teamsters Union is hereby certified as the exclusive collective bargaining representative of all of the

⁴The revised tally of ballots is as follows;

Teamsters	6
No Union	1
Uncounted Ballots	2
Unresolved Challenged Ballots	1
Total	10

agricultural employees of Simon HaJdcer in the State of
California.

DATED: May 10, 1994

BRUCE J. JANIGIAN, Chairman I

VONNE RAMOS RICHARDSON, Member

Member Frick, Concurring:

I concur with my colleagues to the extent that they affirm the findings and recommendations contained in the RD's Challenged Ballot Report and certify Teamsters Union, Local 517 as the exclusive bargaining representative. The RD provided a cogent analysis, in that he correctly identified the issues in dispute, cited the pertinent legal principles,¹ and carefully

¹The RD quite properly adopted the standards generally used by the courts and the National Labor Relations Board to distinguish between employees and independent contractors. The use of these broad standards is also consistent with the approach taken by the California Supreme Court in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 [256 Cal.Rptr. 543]. Thus, while common law agency principles should be the analytical focus, the Board should also take into account circumstances peculiar to agriculture, as well as the corresponding remedial purposes of the Agricultural Labor Relations Act (Act). Such an analysis is not a mechanical one and should not rely on any one factor too heavily, since rarely will all factors point in a single direction. Instead, all factors bearing on the employee/employer relationship must be balanced in order to determine employee status.

applied those principles to the known facts.²

DATED: May 10, 1994

LINDA A. FRICK, Member

²Under the operation of Labor Code section 1140.4, subdivision (c) , though an independent contractor is not an employee of the agricultural employer, the employees of an independent contractor who is acting as a farm labor contractor are deemed to be employees of the agricultural employer. The only challenged voter in this case that appears to have been an employee of an independent contractor is Duane Penner, who worked for Bobby Schales, Jr. However, there is no allegation nor evidence that Schales was functioning in the capacity of a farm labor contractor.

CASE SUMMARY

SIMON HAKKER
(Teamsters Union, Local 517)

20 ALRB No. 6
Case No. 94-RC-1-VI

Background

On January 5, 1994, a petition for certification was filed with the Agricultural Labor Relations Board (Board) by the Teamster Union, Local 517, Creamery Employees And Drivers, International Brotherhood of Teamsters Union (Teamsters), seeking a unit of the agricultural employees of Simon Hakker (Employer). An election was held on January 14, 1994, with the result that of the 26 ballots cast, there were 6 cast for the Teamsters and 1 cast for "No Union." There were 19 unresolved challenged ballots. Since the number of unresolved challenged ballots was outcome determinative, the Regional Director (RD) conducted an investigation and issued the attached Challenged Ballot Report on March 14, 1994. In his report, the RD recommended that the challenges to 16 ballots be sustained, two be overruled and the ballots counted, and one be set for hearing should it be outcome determinative after a final decision as to the other challenges. Most of the 16 challenges were sustained on the basis that the challenged voters were independent contractors rather than employees. The Employer filed timely exceptions to the Challenged Ballot Report, asserting that the RD erred in sustaining 16 of the challenges and finding that conflicting evidence required a hearing as to one of the challenges.

Board Decision

The Board affirmed all of the recommendations in the RD's Challenged Ballot Report, with the exception that it ordered that the ballots of the two voters whose challenges were overruled not be opened and counted. In affirming the RD's recommendations, the Board noted that the sole and pivotal inquiry in determining challenged ballots was whether the challenged voters were agricultural employees of the Employer at any time during the payroll period immediately preceding the filing of the petition for certification (Labor Code sec. 1140.4(b)). The RD Report showed facts sufficient to establish that these individuals were not treated as employees, nor did they understand themselves to have the status of employees. The absence of required payroll records or deductions from the payments issued to these individuals was persuasive evidence that they were not employees.

Member Frick concurred to the extent that the findings and recommendations of the RD were affirmed, but also cited approvingly the analysis applied by the RD.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD
OF THE
STATE OF CALIFORNIA

In the Matter of:

TEAMSTERS UNION, LOCAL 517,
CREAMERY EMPLOYEES AND DRIVERS,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS UNION,

Petitioner,

and

SIMON HAKKER,

Employer.

CASE NO. 94-RC-1-VI

CHALLENGED RAT.T.DT REPORT



Pursuant to a Petition for Certification filed on January 5, 1994, an election was held under my direction and supervision on January 14, 1994, among the employees of the Employer in the appropriate unit consisting of all agricultural employees of the Employer in the State of California.

After the election, the parties were furnished with a tally of ballots, a copy of which is attached hereto as Exhibit A, which showed that of the twenty-seven (27) workers set forth on the Employer's list of eligible employees, twenty-six (26) cast ballots, six (6) of which were cast for the Petitioner and one (1) of which was cast for "No Union." There were nineteen (19) unresolved challenged ballots.

Because the number of challenged ballots was sufficient to effect the outcome of the election, the undersigned, pursuant to

Section 20363 (a) of the Regulations of the Agricultural Labor Relations Board (Board or ALRB), after reasonable notice to all parties to present relevant evidence, has completed an investigation of the challenged ballots, duly considered all evidence submitted by the parties and otherwise disclosed by the investigation, and issues this report thereon.

I. THE CHALLENGED BALLOTS:

Each of the nineteen (19) challenged voters was challenged on the ground that the prospective voter was not employed in the appropriate unit during the applicable payroll period, December 16 through December 31, 1993. (Regulations, Section 20355(a) (2)) The primary issue concerning Daniel Delgado, Jr.; Mike Costa; Daniel M. DeJongh; Nicholas James Groenenberg; Bobby Dean Schales, Jr.; Eugene George Haws; Mark Haws; Christopher Raulino; William Samuel Walker; Gerald Brouwer; Douglas Duston; Ron Grant; Rein Verburg, II and Ira Stout was whether these individuals were employees or independent contractors. The primary issue concerning Cheryl Hakker; Jennifer Ann Hakker; George Smith, Jr. and Duane Chester Penner was whether these individuals had been employed during the applicable payroll period. The issue concerning Augustine Palacio was whether, under the special circumstances of his voluntarily rendering services to the Employer as part of a rehabilitation program in which he was enrolled, he could properly be classified as an employee.

II. THE INVESTIGATION:

Prior to the election, on numerous occasions the Region

requested the Employer to submit documents evidencing the employees who had worked during the applicable payroll period. However, the only payroll documentation furnished to the Region by the Employer was a partial copy of a check ledger. The portion provided to the Region covered the period December 10 through December 30, 1993. Each of the nineteen (19) challenged voters either did not appear on those records during the applicable payroll period or appeared in an entry other than "Salary & Wages". At the election none of the challenged voters were able to produce any documentation evidencing their employment at the Employer during the applicable payroll period. Although on at least four occasions (before and after the election) the Region specifically requested the Employer to provide documentation which would show the days and hours worked by each of the workers set forth on the Employer's eligibility list,¹ the Employer provided no such documents, stating, through its representative, that no such documents existed.

In response to the Region's post-election invitation to submit evidence, the Employer initially submitted no evidence but did send a letter in which it set forth its conclusions as to the status of the challenged voters. Subsequently, after the Region again requested - evidence of the Employer's positions, the Employer submitted the following documents: (1) A copy of its Quarterly Contribution Return to the Employment Development Department (EDD) for the quarter ended December 30, 1993; (2) A copy of a billing

¹ This documentation is also required to be submitted with the Employer's Response to Petition for Certification.

statement from Christopher Raulino for breeding services rendered December 15, 1993, through January 31, 1994; (3) A copy of a billing statement from Daniel Delgado for tractor repair work performed December 26 through December 29, 1993; (4) Copies of two billing statements from Dan's Pipe Corrals & Welding, dated December 11, 1993, and December 31, 1993 (there is no indication on the statements when the work was performed) ; (5) Copies of nine checks issued by the Employer as follows: To Jennifer Hakker dated December 24, 1993, \$700.00; to Jennifer Hakker dated December 28, 1993. \$400.00; to Chris Raulino dated December 24, 1993, \$1098.00; to Cheryl Hakker dated December 30, 1993, \$250.00; to Ira Stout dated January 3, 1994, \$200.00; to Dan DeJongh dated January 6, 1994. \$1020.00; To Gene Haws dated January 15, 1994, \$1209.50; to Dr. Duston dated January 18, 1994, \$1470.64; to Danny Delgado dated January 26, 1994, \$460.00.

In its Response to the Petition for Certification, the Employer stated that it had a bi-monthly payroll, with payroll periods ending on the 15th and last day of each month. The Employer's check ledger pages, however, show entries under the category "Salary & Wages" for checks written on December 14 for some workers and on December 16 for other workers. The records, supplied only through December 30, also show entries under "Salary &. Wages" on December 27 and December 30. All such entries under "Salary & Wages" indicate deductions, although the nature thereof is not reflected on the check ledger. Additional records submitted to the Region by the Teamsters Union, Local 517, Creamery Employees

and Drivers, indicate that deductions are made for social security, medicare and State disability insurance (SDI).

At the election signed statements were obtained by Board agents from each of the individuals whose ballots were challenged. Subsequently additional information was obtained by a Board agent by telephone.

III. ANALYSIS. CONCLUSIONS AND RECOMMENDATIONS:

It is noted that "independent contractors" are not specifically excluded from the definition of "agricultural employee" set forth in Section 1140.4(b) of the Act; nor are they listed in Section 20355(a) of the Board's Regulations which sets forth the categories of persons who are ineligible to vote. However, independent contractors, as defined in case precedent of the National Labor Relations Board (NLRB) are not included as "employees" under the National Labor Relations Act (NLRA). As shown in the discussion below, the reasons for such exclusion are equally applicable to the Agricultural Labor Relations Act (Act).

Under Section 2(3) of the NLRA, independent contractors are specifically excluded from the definition of "employee" In Chemical Workers v. Pittsburgh Plate Glass Co. (1971) 404 U.S. 157, 78 LRRM 2974, 2977, the Court stated that the term "employee" must be understood with reference to the purpose of the NLRA and the facts involved in the economic relationship. The legislative history of Section 2(3) indicated that the term "employee" was not to be stretched beyond its plain meaning embracing only those who work for another for hire. It is clear that the intent of the

Agricultural Labor Relations Act (Act) was to equalize the bargaining power between employers and those who, until the establishment of the Act, were without such power in the work place - i.e. those who work for another for hire. Accordingly, independent contractors, whose position affords them a bargaining power equal to the employer, could not properly be included as "employees" under the Act. In Dairy Employees Union Local No. 17 (H & J Dairy). Case No. 86-RC-9-EC(SD) , the Board adopted the recommendations of the Regional Director excluding independent contractors as unit employees.

In NLRB v. United Insurance Company (1968) 390 U.S. 254, 67 LRRM 2649, the United States Supreme Court, stated that the common law agency test should be applied in distinguishing an employee from an independent contractor. The NLRB and the Courts have adopted a test relating to the right of control to determine whether individuals are independent contractors or employees. Employer efforts to monitor, evaluate and improve the results or ends of the worker's performance do not make the worker an employee. North American Van Lines v. NLRB (D.C.Cir. 1989) 869 F.2d 596, 130 LRRM 2837, 2840. The employer's control of only the results to be achieved indicates an independent contractor relationship. If, in addition, the employer controls the manner and means to be used in attaining the result to be achieved, this indicates an employer/employee relationship. The resolution of this question depends on all of the incidents of the relationship and the facts of each case; no one factor is determinative. North

American Van Lines v. NLRB. supra. 130 LRRM at 2840; Metro Cars. Inc. (1992) 309 NLRB 513, 515, citing News Syndicate Co. (1967) 164 NLRB 422, 423-424; Pierre's Vending Company. Inc. (1985) 274 NLRB 1219, 1220; Precision Bulk Transport (1986) 279 NLRB 437, 437.

Among the factors considered significant under the "right to control" test are (1) whether the individual performs functions that are an essential part of the company's normal operation or operates an independent business; (2) whether they have a permanent work relationship with the company which will ordinarily continue as long as performance is satisfactory; (3) whether they do business in the company's name; (4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; (5) whether particular skills are required for the duties the individual performs; (6) whether the individual has a proprietary interest in the work in which he is engaged and (7) whether he has the opportunity to make decisions which involve risks taken by the independent businessperson which may result in a profit or loss. Metro Cars. Inc.. supra, at 515, citing Standard Oil Co. (1977) 230 NLRB 967, 968, and NLRB v. Pepsi Cola Bottling Co. (6th Cir. 1972) 455 F.2d 1134, 1141 [79 LRRM 2579]. Other relevant factors are (1) the nature of the parties' understanding, (2) indicia of entrepreneurial activity and risk; (3) the worker's ownership of tools of the trade and (4) the method of compensation and tax withholding. Metro Cars. Inc.. supra, at 515; North American Van Lines v. NLRB. supra. 869 F. 2d at 599, 130 LRRM at 2840; Pierre's

Vending Co., supra, at 1220.

(i) Daniel Delgado. Jr.

The investigation disclosed that Daniel Delgado, Jr. worked at the Simon Hakker operations doing repair work on tractors and other agricultural machinery, such as cotton pickers, on an "as needed" basis, when contacted by Hakker. No other worker at the Hakker operations performs this type of work. Delgado supplies his own tools and equipment; Hakker supplies whatever parts are required. Delgado is compensated at the rate of \$20.00 per hour, pursuant to mutual agreement between himself and Hakker; no deductions are taken therefrom. (The records indicate that withholdings for social security, medicare and SDI are made from the wages paid to milkers and ranch hands.) To obtain payment for his services, he submits a billing to Hakker at the completion of the work. He performs these same services for approximately thirty-five (35) other companies. Simon Hakker and Simon Hakker, Jr. advise him what work is required and inspect and approve the finished work; they do not, however, instruct him in the specifics of how to perform the repairs. Delgado's billing indicates that he performed forty (40) hours of tractor repair work at the Hakker operations from December 26 through December 29, 1993. In 1993 the only other work he rendered to Hakker was approximately sixteen (16) hours of cotton picker repair work in both October and November. There is no entry for Delgado in the check ledger pages provided by the Employer. Delgado is not listed in the Employer's EDO Quarterly Contribution Return. Based on the foregoing, I

conclude that Daniel Delgado, Jr. is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to his ballot be sustained,

(ii) Daniel M. DeJongh

The investigation disclosed that Daniel M. DeJongh operates a welding business under the name Dan's Pipe Corrals & Welding. In 1993 he repaired fences at the Simon Hakker operations. DeJongh stated that in December he had worked at the Hakker operations on the 17, 18, 20, 21, 22, 27, 28 and 29; however, his billing of December 31 does not set forth the dates on which he worked, only that he worked 61 hours. DeJongh provides services to Hakker "as needed"; he is permitted to set his own schedule for the work with Simon Hakker's approval. No other worker at the Simon Hakker operations does this type of work. DeJongh supplies his own equipment (welding tools); Hakker provides a vehicle and workers to transport DeJongh and pipes to the various locations where repairs are needed. Hakker advises DeJongh what work is required and reviews and approves the finished work, but does not direct DeJongh in the specifics of how to do the work. DeJongh provides the same services for several other companies. To obtain payment for his services, DeJongh submits a billing to Hakker (at the rate of \$20.00 per hour) at the completion of a job assignment. These arrangements are by mutual agreement between Hakker and DeJongh. No deductions are made from the amounts paid to him. The check ledger submitted by the Employer shows only one entry for DeJongh, an earlier payment on December 15 in the amount

of \$800.00 to "Dan's Welding" entered under the category "Repairs & Maintenance." DeJongh is not listed in the Employer's EDD Quarterly Contribution Return. Based on the foregoing, I conclude that Daniel M. DeJongh, doing business as Dan's Pipe Corrals & Welding, is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to his ballot be sustained,

(iii) Nicholas James Groenenberg

The investigation disclosed that Nicholas James Groenenberg, listed in the Yellow Pages of the telephone directory as an "agricultural consultant", provided agronomy services (crop production analyses relating to fertilizer problems, insect control, soil sampling) to the Simon Hakker operations. Groenenberg stated that during the applicable payroll period, he worked three (3) hours in one location and four (4) hours in each of two other locations at the Hakker operations, but could not state the dates. Simon Hakker advised him as to the work he desired, but did not supervise or control his work. Groenenberg provided his own vehicle to get to the various locations; Hakker provided a tractor and soil sampling equipment for Groenenberg's use. Groenenberg provided no other services for Hakker in 1993, although he has provided services to Hakker in several years past. Groenenberg provides the same services to several other companies. Groenenberg is compensated at the rate of \$7.00 per acre analyzed. These arrangements are by mutual agreement between Hakker and Groenenberg. In order to receive payment for his services,

Groenenberg submits a billing statement to Hakker at the completion of his work. No deductions are made from the amount paid to Groenenberg. There is no entry for Groenenberg in the check ledger pages provided by the Employer. Groenenberg is not listed in the Employer's EDD Quarterly Contribution Return. Based on the foregoing, I conclude that the services rendered by Nicholas James Groenenberg require specialized scientific expertise on his part. I further conclude that Groenenberg is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to his ballot be sustained.

(iv) Bobby Dean Schales, Jr.

The investigation disclosed that Bobby Dean Schales, Jr. with his father, Schales, Sr., operates a business under the name G & B Ranches which supplies and spreads manure. Schales provided these services for the Simon Hakker operations on December 24 and 27; he believes he also provided such services for Hakker in the spring of 1993. Schales provides the same services for approximately forty (40) other companies. Schales provides his own equipment, including trucks, spreaders and loaders; he also provides workers. At the Hakker operations in December 1993 he provided three workers, Duane Penner, Larry Homan and Mark Schales, whom he paid. Simon Hakker, Jr. instructed him regarding the work he wanted done and reviewed the completed work, but did not direct Schales or Schales' workers in the specifics of how to do the work. Schales is compensated at the rate of \$30.00 per load. These arrangements are by mutual agreement between Hakker and Schales.

No deductions are made from the amounts paid to Schales. In order to be paid for his services, Schales submits a billing statement under the name G & B Ranches to Hakker at the completion of the work. He believes he billed Hakker approximately \$1,000 for the work performed in December 1993. There is no entry for Schales or G & B Ranches in the check ledger pages provided by the Employer. Neither Bobby Dean Schales, Jr., Mark Schales, Larry Homan nor Duane Penner² are listed in the Employer's EDO Quarterly Contribution Return. Based on the foregoing I conclude that Bobby Dean Schales, Jr. is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to his ballot be sustained,

(v) Duane Chester Penner

The Employer, through its representative, stated that Duane Chester Penner worked at the Simon Hakker operations during the applicable payroll period. However, there is no entry for Penner on the check ledger pages provided by the Employer, and the Employer provided no documentation to evidence Penner's employment by Hakker. Penner is not listed on the Employer's EDD Quarterly Contribution Return. Based on the foregoing and on the information submitted by Bobby Dean Schales, Jr. (See Paragraph (iv) above), I conclude that Penner was not employed by the Employer, but was an employee of the independent contractor Bobby Dean Schales, Jr., doing business as G & B Ranches. Therefore,

² Of these four workers, only Bobby Dean Schales, Jr. and Duane Penner were listed on the Employer's eligibility list. The Employer did not list Mark Schales or Larry Homan.

Penner was not employed in the appropriate unit. I recommend that the challenge to his ballot be sustained,

(vi) Christopher Raulino

The investigation disclosed that Christopher Raulino works regularly at the Simon Hakker operations two hours each workday inseminating cows. He is paid by the cow at the rate of \$4.00 and averages ten (10) cows per day. No other worker at the Hakker operations performs these services. Simon Hakker advises him regarding the work he wants done, but does not supervise him in the actual performance of his work. Raulino is a member of the National Association of Animal Breeders and Certified Semen Services. He performs the same services for several other companies. In order to be paid for his services, Raulino submits a monthly billing statement to Hakker under the designation "American Breeders Service Representative." There is one entry for Raulino on the check ledger pages submitted by the Employer on December 24, 1993, in the amount of \$1098.00. No deductions are made from the payment to Raulino and it is entered in the category "Breeding Fees". Raulino is not listed on the Employer's EDD Quarterly Contribution Return. Based on the foregoing I conclude that the services rendered by Raulino require an expertise not shared by the regular employees of Simon Hakker. I further conclude that Christopher Raulino is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to his ballot be sustained.

(vii) William Samuel Walker

The investigation disclosed that William Samuel Walker conducts hauling operations under the name E & B Trucking. He loaded and hauled cotton seed for the Simon Hakker operations on December 22 and 23, working ten (10) hours each day. This was the only time he provided services for Hakker in 1993. He provides his own truck, but used Hakker's loader. Simon Hakker, Sr. instructs him as to the work he wants done, but does not direct him in the specifics of how the work is performed. He performs hauling services for other companies. He is paid by the load, his mutual agreement with Hakker being \$180.00 per load. To obtain payment for his services, he submits a billing under the name E & B Trucking upon the completion of the work. No deductions are made from the amounts paid to him. No entry for William Samuel Walker appears on the check ledger pages furnished by the Employer,³ and Walker is not listed on the Employer's EDD Quarterly Contribution Return. Based on the foregoing, I conclude that William Samuel Walker is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to his ballot be sustained.

(viii) Gerald Brouwer

The investigation disclosed that Gerald Brouwer conducts a calf-raising operation at his own facilities under the name Crestview Calf Ranch. In addition to boarding the calves and

³ There is an entry on December 26 for "E & B" in the amount of \$269.58 listed under the category "Auto & Truck Expenses".

overseeing them, he provides all feed, medicines and vaccinations required. He is paid piece-rate, \$11.50 per calf per day. This rate, reached by mutual agreement between Brouwer and Hakker, covers the feed, medicines and vaccinations. In order to obtain payment for his services, he submits a billing statement. No deductions are made from the amount paid. In 1993 he provided these same services to twelve (12) other companies. Simon Hakker advises him what he will require for Hakker's entire calf program, but does not direct him in the performance of his services. Mr. Brouwer stated that he had calves assigned to him by Hakker year-round, including during the applicable payroll period. The only entry on the check ledger pages provided by the Employer which appears to relate to Mr. Brouwer is a check issued December 15, 1993, to "Crestview Calf" in the amount of \$3683.00; there are no deductions. This payment is entered under the category "Feed Purchased"⁴ Brouwer is not listed on the Employer's EDD Quarterly Contribution Return. Based on the foregoing, I conclude that Gerald Brouwer is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to his ballot be sustained,

(ix) Douglas Duston

The investigation disclosed that Douglas Duston is a practicing veterinarian. He performs regular services for Simon Hakker, inspecting cows and calves at the Hakker operations every

⁴ Jennifer Hakker is also alleged to have performed calf-raising services for the Simon Hakker operations. Payment to "J. Hakker" is also entered under the category "Feed Purchased".

other Tuesday to check pregnancies, give required vaccinations, and perform needed medical services. In 1993 he performed similar services for approximately twenty (20) other companies. Roger Hakker advises him regarding problems or needed care, but does not direct him in the performance of his duties. Pursuant to mutual agreement between him and Hakker, Duston is paid at the rate of \$70.00 per hour plus charges for medications he furnishes,- no deductions are made. He submits a billing statement to Hakker. On the check ledger pages provided by the Employer there is one entry for Douglas Duston at December 24 in the amount of \$1288.18 listed under the category "Veterinary Fees". Duston is not listed on the Employer's EDD Quarterly Contribution Return. Based on the foregoing, I conclude that Douglas Duston is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to his ballot be sustained.

(x) Eugene George Haws

The investigation disclosed that Eugene George Haws performed cement work and welding for the Simon Hakker operations, but was unable to firmly establish the dates on which these services were rendered. Haws "guesses" that he performed those services on December 27 through 31, 1993. Haws does not appear on the check ledger pages submitted by the Employer; no other documentation was submitted to establish the dates on which Haws worked at the Hakker operations. The check issued to Haws on January 15, 1994, does not include any information regarding when

services were performed. Haws is not listed on the Employer's EDO Quarterly Contribution Return. Simon Hakker contacts Haws to perform specific jobs. Other than the five days' work Haws performed, he believes, in December, Haws performed no other work for Hakker in 1993. Haws performs the same services for other companies. He provides his own equipment. Simon Hakker instructed him regarding what work he wanted done, but did not supervise the manner in which Haws performed that work. Haws is paid at the rate of \$20.00 per hour per agreement between him and Hakker, no deductions are made therefrom. Haws submits a billing upon the completion of the work. Based on the foregoing, I conclude that Eugene George Haws is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I further conclude that there is insufficient evidence to establish that Haws worked at the Simon Hakker operations during the applicable payroll period. I recommend that the challenge to his ballot be sustained,

(xi) Mark Haws

The investigation disclosed that Mark Haws performed cement work and welding for the Simon Hakker operations. The arrangements for his services were made between Simon Hakker and Eugene George Haws; also billings for the work performed are sometimes sent under the name Eugene George Haws, sometimes under the name Mark Haws. Although Mark Haws stated that he worked at the Simon Hakker operations each day during the applicable payroll period, no entry for Mark Haws appears on the check ledger pages provided by the Employer, and no other documentation was provided

to establish the employment of Mark Haws (although the Employer provided a copy of a check payable to Eugene Haws) or the dates during which he performed services. He is not listed on the Employer's EDO Quarterly Contribution Return. Other than these services, he did not perform work for Simon Hakker in 1993. Mark Haws supplies his own equipment. Simon Hakker instructed him what work was to be done but did not supervise the manner in which Haws performed the work. Mark Haws is paid at the rate of \$14.00 per hour per mutual agreement with Hakker and submits a billing, either under his own name or under the name of Eugene George Haws, when the work is completed. Based on the foregoing, I conclude that Mark Haws is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I further conclude that there is insufficient evidence to establish that Mark Haws worked at the Simon Hakker operations during the applicable payroll unit. I recommend that the challenge to his ballot be sustained.

(xii) Mike Costa

The investigation disclosed that Mike Costa performs barn cleaning and sanitizing services once a month at the Simon Hakker operations, working one day each month for two hours. He submits a monthly billing for a flat rate of \$60.00. No deductions are made from the payment to Costa. In performing these duties, he uses Hakker's equipment (hose, chemicals and water). Simon Hakker instructs him regarding what he wants done but does not supervise Costa in the specific performance of his job. Costa performs the

same services for approximately thirty (30) other dairies. No other worker at the Simon Hakker operations performs these duties. There is no entry on the check ledger pages provided by the Employer for Mike Costa, and he is not listed on the Employer's EDD Quarterly Contribution Return. Based on the foregoing, I conclude that Mike Costa is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to his ballot be sustained,

(xiii) Augustine Palacio

The investigation disclosed that Augustine Palacio is enrolled in a rehabilitation program conducted by the Kings Ranch Campus Ministries. Pastor Rafael at the Ministries advised that as part of the rehabilitation program, the participants volunteer their services to local businesses. There is no requirement that any business accepting these services compensate either the worker or the Ministries for the services rendered; however, the Ministries will accept donations and most businesses, in one form or another (cash payment, donation of goods, assumption of payment of one of the Ministries' bills) make a donation. The value of the donation is not related to the services rendered. Participants in the rehabilitation program receive a stipend from the Ministries, which is based on what the Ministries can afford; the amount is not related to any work services performed by the participant. Augustine Palacio worked at the Simon Hakker operations driving tractors and a cotton picker. The dates when these services were performed were not supplied. There is no entry for Augustine

Palacio or the Kings Ranch Campus Ministries on the check ledger pages provided by the Employer. Augustine Palacio is not listed on the Employer's EDO Quarterly Contribution Return. Based on the foregoing, I conclude that Augustine Palacio performed voluntary work at the Simon Hakker operations as part of his rehabilitation program. I further conclude that Palacio does not meet the criteria for a "worker for hire" and, therefore, is not an employee of Simon Hakker. Accordingly, Augustine Palacio was not employed in the appropriate unit. I further conclude that there is insufficient evidence to establish that Palacio worked during the applicable payroll period. I recommend that the challenge to his ballot be sustained.

(xiv) Rein Verburg II

The investigation disclosed that Rein Verburg II, who operates his own farm, sporadically performs disking work for Simon Hakker in exchange for the use of Hakker's equipment to work his own farm. These arrangements are by mutual agreement between Verburg and Hakker. Verburg stated that he performed disking work on Hakker's property on December 20 and 21 for a total of five (5) hours; in 1993 he performed such services a total of seventeen (17) days. Verburg selects the times when he wishes to perform such services; Hakker tells him which fields to disc but does not supervise his work. Verburg is not listed on the Employer's EDD Quarterly Contribution Return. Based on the foregoing, I conclude that Rein Verburg II does not meet the criteria of a "worker for hire" but is in the nature of an independent contractor in that he

renders services sporadically at times of his own choosing for the benefit of his own operations upon mutually-agreed to terms distinct from the terms of employment of Hakker employees. I, conclude, therefore, that Verburg was not employed by Hakker in the appropriate unit. I recommend that the challenge to his ballot be sustained.

(xv) Ira Stout

The investigation disclosed that Ira Stout has entered into a lease agreement with Simon Hakker pursuant to which Stout leases to Hakker six acres of pasture land; included with the lease of the property are Stout's services for one hour per day feeding the cattle Hakker assigns to that land. Total compensation paid by Hakker for this package is \$200 per month, an arrangement reached by mutual agreement between Hakker and Stout. Stout performs no other services for Hakker. Hakker provides hay and salt blocks for the cattle on that land. There is no indication that Stout would be employed absent the leasing arrangements. Stout performs his feeding duties independently without supervision. Ira Stout is not listed on the Employer's EDD Quarterly Contribution Return. The check in the amount of \$200.00 payable to Stout dated January 3, 1994, is consistent with the leasing agreement. Based on the foregoing I conclude that Ira Stout does not meet the criteria for a "worker for hire" but is instead an independent entrepreneur who has entered into an arrangement with Hakker unique to Stout and based upon his ownership and leasing of the pasture land. I conclude, therefore, that Ira Stout was not employed by Hakker in

the appropriate unit. I recommend that the challenge to his ballot be sustained.

(xvi) Ron Grant

The investigation disclosed that Ron Grant is employed on a full time basis by Blair Air Service where he loads planes. He worked at the Simon Hakker operations spreading manure and disking for approximately ten (10) days in November 1993 and approximately three (3) to four (4) days in December 1993. Although Grant stated that the latter days were within the period December 16 through 31, he did not specify dates. There is no entry on the check ledger pages for Ron Grant, and the Employer has provided no documentation to establish when Grant was employed. Ron Grant is not listed on the Employer's EDD Quarterly Contribution Return for the third quarter 1993. Based on the foregoing, I conclude that Ron Grant meets the criteria for an employee; however, I further conclude that there is insufficient evidence to establish that Grant worked at the Simon Hakker operations during the applicable payroll period. I recommend that the challenge to his ballot be sustained.

(xvii) George Smith.Jr.

The investigation disclosed that George Smith, Jr. worked at the Simon Hakker operations from September 1 through December 31, 1993, on a part-time basis hauling feed, cow manure and cotton seed to various locations at the operations. Smith was compensated based upon a percentage of the weight of the loads hauled. All equipment was supplied by Hakker. Smith performed these services for no other company. Two entries appear on the

check book ledger pages under the name "G. Smith", one on December 14, 1993, and the other on December 23, 1993. Both are listed under the category "Salaries & Wages" and show deductions. George Smith is listed on the Employer's EDD Quarterly Return. Based on the foregoing, I conclude that George Smith, Jr. was employed in the appropriate unit during the applicable payroll period. I recommend that the challenge to his ballot be overruled and his ballot be counted.

(xviii) Cheryl Hakker

The investigation disclosed that Cheryl Hakker is the daughter-in-law of Simon Hakker. Ms. Hakker performs clerical duties to keep track of breeding information and also does miscellaneous ranch work as needed, such as washing cows, moving cows, tractor work. She works five days per week, the hours vary. She is paid at the rate of \$5.50 per hour. There is no entry on the check ledger sheets for Cheryl Hakker; however, the Employer provided a copy of a check dated December 30, 1993, payable to Cheryl Hakker in the amount of \$250.00.⁵ It appears therefrom that no deductions are taken from Ms. Hakker's wages. Based on the total information disclosed, I conclude that Ms. Hakker is not a confidential employee and that she was employed in the appropriate unit during the applicable payroll period. I recommend that the challenge to her ballot be overruled and that her ballot be counted.

⁵ The copies of the check ledger pages in the Region's possession are not complete. It is obvious that a portion of the page relating to December 30 was cut off.

(xix) Jennifer Ann Hakker

At this time the investigation has disclosed that Jennifer Ann Hakker is the granddaughter of Simon Hakker. However, the investigation has also produced conflicting statements relating to the services provided by Jennifer Ann Hakker and insufficient evidence upon which to make a conclusion as to her status. Therefore, I am unable to conclude whether the challenge to her ballot should be sustained or overruled. Accordingly, I conclude that the challenge to the ballot of Jennifer Ann Hakker raises substantial and material factual and legal issues which can best be resolved by a hearing on this matter. However, it is possible that this one ballot will not be outcome determinative. Therefore, it is recommended that the ballot of Jennifer Ann Hakker not be counted and no hearing held unless it is outcome determinative after a final decision has been rendered regarding the other challenged ballots herein.

IV. SUMMARY OF RECOMMENDATIONS:

A. Ballots to be Opened and Counted:

George Smith, Jr.
Cheryl Hakker

B. Ballots Not to Be Opened and Counted:

Daniel Delgado, Jr.
Daniel M. DeJongh
Nicholas James Groenenberg
Bobby Dean Schales, Jr.
Duane Chester Penner
Christopher Raulino
William Samuel Walker
Gerald Brouwer
Douglas Duston
Eugene George Haws
Mark Haws

Mike Costa
Augustine Palacio
Rein Verburg, II
Ira Stout
Ron Grant

- C. Unresolved - If Not Outcome Determinative. Not to Be Opened and Counted. If Outcome Determinative, Set for Hearing _____

Jennifer Ann Hakker

V. PROCEDURES REGARDING EXCEPTIONS TO THE REPORT:

Pursuant to the provisions of 8 Cal.Code Regs. Section 20363(b) the foregoing conclusions and recommendations of the Regional Director shall be final and conclusive unless exceptions thereto are filed with the Executive Secretary of the Board by personal service within five (5) days, or by deposit in registered mail postmarked within five (5) days, from the date of service upon the parties of this Report.

An original and six (6) copies of the exceptions shall be filed and shall be accompanied by seven (7) copies of Declarations or other documentary evidence in support of the exceptions.

Copies of any exceptions and supporting documents shall be served pursuant to 8 Cal.Code Regs. Section 20166 on all other

parties to the proceeding and on the Regional Director making this Report, and Proof of Service shall be filed with the Executive Secretary of the Board with the exceptions and supporting documents.

Date: March 14, 1994

A handwritten signature in black ink, appearing to read "Lawrence Alderete", written over a solid horizontal line.

Lawrence Alderete
Visalia Regional Director
Agricultural Labor Relations Board
711 N. Court Street - Suite H
Visalia, California 93291
Tel. 209-627-0995

State of California
Agricultural Labor Relations Board

PROOF OF SERVICE BY MAIL

(8 Cal.Code Regs. Sec. 20164)

I am a citizen of the United States and a resident of the County of Tulare. I am over the age of eighteen years and not a party to the within entitled action. My business address is: 711 N. Court Street, Suite H, Visalia, California 93291.

On March 14, 1994, I served the within Challenged Ballot Report, Simon Hakker, Employer. Case No. 94-RC-1-VI, on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Visalia, California, addressed as follows:

CERTIFIED MAIL:

Mr. Stephen Marten
Pacific Employers
P.O. Box 3982
Visalia, CA 93278

Mr. John Davis
Teamsters Union, Local 517,
Creamery Employees and Drivers,
International Brotherhood of
Teamsters,
512 W. Oak Street
Visalia, CA 93291

FILED:

CERTIFIED MAIL:

Executive Secretary
Agricultural Labor Relations Board
915 Capitol Mall, 3rd Floor
Sacramento, CA 95814

Executed on March 14, 1994, at Visalia, California.

I declare under penalty of perjury that the foregoing is true and correct.



Pauline O. Alvarez

AGRICULTURAL LABOR RELATIONS BOARD
CONSEJO DE RLLACIONES DL IRABAJADORLS AGRICOLAS

Employer SIMON HAKKER
Case Number 94-Rc-1-VI

Date of Election 1-14-94
Date Issued: 1-14-94

TALLY OF BALLOTS
CUENTA DE VOTOS

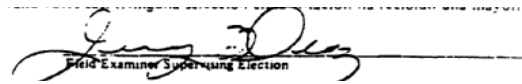
The undersigned board agent certifies that the results of the tabulation of ballots cast in the election held in the above case an concluded on the date indicated above, were as follows:

(El agente de consejo suscribiente certifica que el resultado de la cuenta de las balotas dadas en la eleccion del caso citado arriba. Concluida en la fecha indicada arriba. Fue la siguiente:)

1. Votes cast for (Votos a favor de):	Tally (Cuenta)	
a. <u>Teamsters</u> Petitioner.	<u>6</u>	
b. _____ Intervenor.	_____	
c. _____ Intervenor.	_____	
d. No Union	<u>1</u>	
2. Number of unresolved challenged ballots (Numero de votos desafiados y no resueltos):	<u>19</u>	
3. Total number of all ballots including unresolved challenged ballots. (Numero total de votos validos mas los votos desafiados y no resueltos):	<table border="1" style="display: inline-table; vertical-align: middle;"><tr><td style="text-align: center;">26</td></tr></table>	26
26		

Number of void ballots (Numero de votos invalidos):	_____
Total number of voters (Numero total de votantes):	_____
Number of names on list (Numero de nombres en la lista):	<u>27</u>

4. The number of unresolved challenged ballots is sufficient to affect the outcome of the election (El numero de votos desafiados e suficiente para afectar el resultado de la eleccion).
5. The number of unresolved challenged ballots is insufficient to affect the outcome of the election. And (El numero do voto desafiados no es suficiente para afectar el resultado de la eleccion. Y):
 - a. A majority of the valid ballots counted has been cast for (Una mayona de los votos validos que fueron contados han sido dados favor de) _____
 - b. No choice on the ballot has received a majority of the valid votes cast (Ninguna seleccion en la votacion ha recibido una mayon. de los votos validos).



Field Examiner Supervising Election

The undersigned witnessed the counting and tabulation of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained and that the results were as indicated above We also acknowledge service of a copy of this tally.

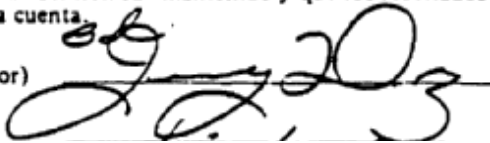
Los subscribienes presenciaron en el cuento y la tabulacion de la votacion citada arriba. Aquí certificamos que la cuenta y la tabulacion fueron hecha justamente e imparcialmente. que lo secreto de la votacion fue mantenido y que los resultados fueron com se ha indicado arriba. Timbien econo mos el servicio de una copia de esta cuenta.

For (Por) _____

...re fairly and accurately done, that the secrecy of t
...nowledge service of a copy of this tally.
...ribientes presenciaron en el cuento y la tabulaci
...ieron hecha justamente e imparcialmente, que lo
...o arriba. Tambien reconocemos el servicio de una co



For (Por) _____

esta cuenta.
r(Por) 

For (Por)

For (Por)

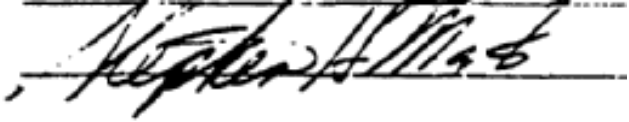


EXHIBIT A

State of California
AGRICULTURAL LABOR RELATIONS BOARD

Estado de California
CONSEJO DE RELACIONES DE TRABAJADORES AGRICOLAS

SIMON HAKKER,

Employer,

and

TEAMSTERS UNION, LOCAL 517, CREAMERY
EMPLOYEES AND DRIVERS, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS UNION,

Petitioner.

Case No. 94-RC-1-VI
Caso Num.

CERTIFICATION OF REPRESENTATIVE
CERTIFICACION DEL REPRESENTANTE

An election having been conducted in the above matter under the supervision of the Agricultural Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no petition filed pursuant to Section 1156.3(c) remaining outstanding;

Habiéndose conducido una elección en el asunto arriba citado bajo la supervisión del Consejo de Relaciones de Trabajadores Agrícolas de acuerdo con las Reglas y Regulaciones del consejo; y apareciendo por la Cuenta de Votos que se ha seleccionado un representante de negociación colectiva; y que no se ha registrado (archivado) una petición de acuerdo con la Sección 1156.3(c) que queda pendiente;

Pursuant to the authority vested in the undersigned by the Agricultural Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for

De acuerdo con la autoridad establecida en el suscrito por el Consejo de Relaciones de Trabajadores Agrícolas, por LA PRESENTE SE CERTIFICA que la mayoría de las balotas validas han sido depositadas en favor de

TEAMSTERS UNION, LOCAL 517, CREAMERY EMPLOYEES AND DRIVERS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION

and that, pursuant to Section 1156 of the Agricultural Labor Relations Act, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

Y que, de acuerdo con la Sección 1156 del Acto de Relaciones de Trabajadores Agrícolas, dicha organización de trabajadores es el representante exclusivo de todos los trabajadores en la unidad aquí implicada, y se ha determinado que es apropiada con el fin de llevar a cabo negociación colectiva con respecto al salario, las horas de trabajo, y otras condiciones de empleo.

UNIT: All the agricultural employees of Employer in the State of California UNIDAD:

Signed at Sacramento, CA

On behalf of

On the 10th day of May 1994

AGRICULTURAL LABOR RELATIONS BOARD

Firmado en _____

En el _____ día de _____ 19____ De Parte del

